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No. 78-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, *Petitioner*

v.

SEABOARD ALLIED MILLING CORP., ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF PETITIONER

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This reply is submitted by petitioner Southern Railway in response to the memorandum filed by the Solicitor General for the United States (U.S. Br.) and the oppositions to certiorari filed by respondents Seaboard Allied Milling Corp., *et al.* (Allied Br.) and Board of Trade for the City of Chicago, *et al.* (Board Br.). The United States recommends that certiorari be granted, confirming the presence of an important recurring jurisdictional question as to which two circuits are in direct conflict. The oppositions offer no persuasive reasons for denying certiorari.

1. In support of certiorari, the United States notes the direct conflict between the lower court's decision and the decision of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977) (U.S. Br. 5), the lower court's clearly erroneous interpretation of *City of Chicago* v. *United States*, 396 U.S. 162 (1969) (U.S. Br. 8, n.8), the importance of a clear pronouncement on the important jurisdictional question presented, and the recurring nature of the controversy. U.S. Br. 6. Under conventional standards, these reasons amply warrant certiorari.

The United States also correctly recognizes that the lower court's attempt to review now a Commission refusal to suspend and investigate violates the settled principle of exhaustion of administrative remedies. U.S. Br. 10-12. This assertion is clearly correct: Section 13(1) provides a complete remedy by permitting any shipper dissatisfied with the Commission's failure to suspend or investigate to begin a complaint proceeding on any ground normally available to contest rates. See Southern Pet. 3-4.[1] The shippers' attempt in this case to bypass their statutory remedy not only ignores the exhaustion principle, but would contribute to a marked, unnecessary proliferation of administrative and judicial proceedings at the very time when concern with this proliferation has become intense.

The United States, unlike the Commission, does suggest that the refusal of the Commission to begin a

[1] Congress has recently codified the provisions of the Interstate Commerce Act, but it has specifically declared, both in the statute itself and in its legislative history, that the codification does not alter the substantive meaning of the Act. 92 Stat. 1466; H.R. Rep. No. 1295, 95th Cong., 2d Sess. 9 (1978). For clarity, this reply continues to refer to the provisions under the original designations.

Section 15(8) investigation may become a relevant issue if and when the shipper can demonstrate in a Section 13(1) proceeding that it has been improperly prejudiced by the allocation of the burden of proof in that proceeding. U.S. Br. 11-12. However, whether or not the United States or the Commission is correct on this issue, the significant point in connection with certiorari is that under either view the lower court was wrong in attempting to review the Commission's action now in advance of any Section 13(1) proceeding. The limited disagreement between the United States and the Commission involves a separate hypothetical case arising under Section 13(1) and does not alter the fact that *this* case, pertaining to Section 15(8), does not involve a reviewable Commission order.

2. In their opposition, Seaboard Allied Milling Corp., *et al.*, wrongly assert that no conflict exists between the lower court's decision and the decision of the D.C. Circuit in *Asphalt Roofing, supra.* Allied Br. 12-14. Their opposition argues that the D.C. Circuit has "recently cited with approval the lower court's holding in this case for the principle that '. . . Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented.' " Allied Br. 13. In fact, the D.C. Circuit cited the lower court's decision as a "but see" citation, clearly suggesting disagreement with rather than approval of the decision.[2] The quoted language, far from being a principle that the D.C. Circuit espoused, appeared in parentheses merely as a summary of the Eighth Circuit's position.[3]

[2] *National Small Shipments Traffic Conference, Inc.* v. *ICC*, No. 78-1099, slip op. 9, n.34 (D.C. Cir., October 26, 1978).

[3] In the text of its recent *National Small Shipments* opinion, the D.C. Circuit stated: "Of course, the decision whether or not

Seaboard Allied also argues in this case that the Commission did not simply fail to investigate a carrier-initiated tariff but affirmatively "authorized" the change in rates contained in the tariff. *E.g.* Allied Br. 9, 10. In fact the Commission's order of September 14, 1977, makes clear that the Commission has not resolved the question of whether the rates involve violations of Sections 2, 3 or 4 of the Act, and the Commission in no way prescribed or approved the carrier-filed tariff. Pet. App. 2b, 3b. The Commission merely determined not to investigate or suspend the admittedly experimental rates prior to their effective date, and remitted shippers to their Section 13(1) remedies.

Alternatively, Seaboard Allied contends that proceedings involving allegations of Section 4 violations present a special case for review because of the "mandatory and non-discretitionary" nature of Section 4 requirements. Allied Br. 7, 9. The implication appears to be that the requirements of other sections of the Act are somehow less mandatory. In fact, the requirement under Section 1(5) that rates be reasonable and the anti-discrimination provisions of Sections 2 and 3 are no less mandatory than the long and short haul provisions of Section 4. If anything, the mandate

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to suspend a rate is itself not reviewable." Slip op. 9. The appended footnote, mistakenly relied on by Seaboard Allied, reads as follows:

> "*See, e.g., National Small Shipments I*, 321 F. Supp. at 505-06, 515; *cf. Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 662-67 (1963); *Asphalt Roofing Mfg. Ass'n* v. *ICC*, 567 F.2d 994, 1001-02 (D.C. Cir. 1977). *But see Seaboard Allied Milling Corp.* v. *ICC*, 570 F.2d 1349 (8th Cir. 1978) (Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented)."

of Section 4 is less absolute than those of the other sections, since the Commission is specifically authorized to waive the Section 4 requirement in appropriate cases.

Finally, any alleged distinction between Section 4 and other sections is irrelevant to the question of judicial review presented here. The lower court was not reviewing a final determination by the Commission that no Section 4 violations existed, as respondents claim (Allied Br. 9, 11), nor a decision by the Commission to grant Section 4 relief, as respondents appear at other times to assume. Allied Br. 9. The only determination by the Commission was not to investigate or suspend a tariff under Section 15(8) prior to its effective date. That decision, as the Commission, the United States and the D.C. Circuit agree, is not a reviewable one.

3. The Board of Trade, *et al.*, imply that this Court's decision in the *Trans Alaska Pipeline Rate Cases*, 98 S. Ct. 2053 (1978), supports the Eighth Circuit's decision. Board Br. 3-4. That case, however, involved the quite different question whether the Commission's suspension of a carrier tariff for a new service could be challenged on the limited ground that the Commission had no jurisdiction to suspend such a tariff.[4] *Trans Alaska* in no way suggests that the discretionary refusal of the Commission to initiate a Section 15(8)

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[4] The pipeline owners had contended that the suspension power simply did not extend to initial rates but only to increased or changed rates and that the Commission therefore had no authority to suspend. In considering reviewability, this Court acquiesced in review of suspension orders only "to the limited extent necessary to ensure" that suspension orders "do not overstep the bounds of Commission authority." *Id.* at 2058 n.17.

proceeding is reviewable. By its nature, such a refusal to act cannot involve an unlawful assertion of Commission jurisdiction and necessarily reserves to shippers their established remedies under Section 13(1).

The Board of Trade further argues that immediate judicial review is appropriate whenever the Commission fails to investigate a tariff in the face of claims of "patent illegality." Board Br. 3.[5] The short answer to this contention is that Section 13(1) proceedings are at least as adequate to redress claims of patent illegality as claims of subtle illegality. Where patent illegality exists, a Section 13(1) remedy will, if anything, be even swifter and more adequate, so that the exhaustion doctrine applies with special force under these circumstances. Moreover, the Board's distinction between patent and non-patent claims of illegality is hardly a reliable basis for making determinations of reviewability and would further proliferate appellate proceedings and encourage delay.

Lastly, the Board of Trade contends that the D.C. Circuit's decision in *Asphalt Roofing* is not in conflict with the lower court's decision here because the tariff in that case had not been alleged to be patently unlawful. Board Br. 2, 3. The petitioner in that case in the D.C. Circuit made claims which cannot be distinguished in this fashion, and nothing in the D.C. Circuit's decision suggests that it accepted the distinction

[5] Unlike Seaboard Allied, the Board's position does not depend on any distinction between Section 1-3 claims and claims under Section 4. Instead, the Board apparently believes that immediate review of a decision not to suspend or investigate would be available whatever the statutory basis of the alleged violation.

now urged by the Board of Trade.[6] In short, the Eighth Circuit and the D.C. Circuit are in direct conflict on the reviewability of a refusal to suspend and investigate and are not, as the Board of Trade alleges, merely "diverg[ing]" on a "dictum" or "technical holding." Board Br. 4.

CONCLUSION

For the reasons stated above and in Southern's petition, certiorari should be granted.

Respectfully submitted,

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[6] The orders in *Asphalt Roofing* found unreviewable were in fact vigorously challenged by the petitioner on a variety of grounds including, *inter alia*, the claim that the rate adjustments involved "violated the letter, sense and spirit" of a federal statute. Brief for petitioner, No. 75-1255, p. 24, in *Asphalt Roofing*. The D.C. Circuit did not suggest that its decision turned in any way on the nature or extent of the asserted errors. See 567 F.2d at 1001-02.